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No. 99-1663

IN THE

Supreme Court of the United States

DISTRICT INTOWN PROPERTIES L.P., *ET AL.*,
Petitioners,

v.

DISTRICT OF COLUMBIA, *ET AL.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

Petitioners ask for review of trial and appellate court holdings that they need not be compensated under the Takings Clause of the Fifth Amendment when government regulation allows them to make profitable use of their property by using the property "'precisely as it has been used' for the past 28 years." A. 14a-15a, quoting *Penn Central Transportation Company v. New York*, 438 U.S. 104, 136 (1978).

In comprehensive discussions, all three court of appeals judges agreed that, under this Court's precedent, inability to make more intensive use of the property did not result in a taking. The district court came to the same conclusion on the basis of the same case-law. No relevant split exists among the circuits or among the highest courts of the states. The writ should be denied.

1. The property is an eight-acre tract known as Cathedral Mansions South, across Connecticut Avenue from the National Zoo. It consists of a large apartment house and grounds that front on the Avenue. The property was designed as a coherent whole in 1929 by a noted local developer to create the appearance of a suburban resort. No change in the property's use has occurred since 1929.

The property has been described by the District of Columbia's Historic Preservation Review Board as "sited imaginatively to provide the greatest possible integration of living space with weli-landscaped open space." D.C. Cir. J.A. 286. An administrative law judge, in findings that were never challenged, found:

> The resort-like apartment building was an attempt to bring the kind of amenities people had access to in the suburbs to the city dweller. One of its greatest amenities was, and is, the exposures that are supplied to the tenants, providing air, light, and views.
>
> The lawns are an integral and essential part of the design and concept of [Cathedral Mansions South] * * *.

Id. at 284 (paragraph numbers and citations omitted).

At the time it was acquired in 1961, the apartment complex was subject to the Shipstead-Luce Act, 46 Stat. 366, ch. 291, 40 U.S.C. § 121, D.C. Code § 5-410, enacted to allow "a reasonable degree of control" over private buildings abutting or fronting on various federal properties, including the Zoo. The act authorizes the federal Commission of Fine Arts to review building permit applications and to recommend steps to prevent "reasonably avoidable impairment" of "public values" associated with the federal property. The Mayor of the District of Columbia is directed to "effect reasonable compliance" with the Commission's recommendations.

Since 1979, property in the District of Columbia is governed by a Historic Landmark and Historic District Protection Act, D.C. Code § 5-1001 *et seq*. Landmarks are designated by a Historic Preservation Review Board after a public hearing. Once designated, the landmark cannot be demolished, altered, or subdivided unless the project is one of "special merit" or the owner can establish that denial of the necessary permit would result in "unreasonable economic hardship." D.C. Code §§ 5-1004 to 5-1006. A project of special merit is defined as "a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." D.C. Code § 5-1002(11). No new construction is permitted on the site of a landmark if "the design of the building and the character of the historic district or historic landmark are incompatible." D.C. Code § 5-1007(f). A proposal to add an additional building on a lot already occupied by a building may be denied entirely if the "additional construction will be incompatible with the character of the historic district or historic landmark." *Id.*[1] Most proceedings under the Landmark Act occur in trial-type hearings in accordance with the local Administrative Procedure Act. *See* D.C. Code § 5-1012.

In 1987, two citizens groups began a "widely-publicized process" to have broad areas near Cathedral Mansions South given historic district or landmark designation. D.C. Cir. J.A. 285. (Their efforts ultimately resulted in an almost continuous band of historic districts and landmarks along Con-

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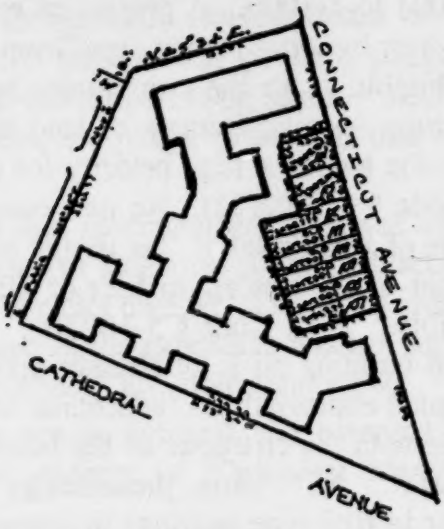
[1] "Compatibility * * * is thus the sole statutory criterion for determining whether new construction shall be authorized." *District Intown Properties L.P. v. Department of Consumer & Regulatory Affairs*, 680 A.2d 1373, 1378 (D.C. 1996).

necticut Avenue for a mile or more both below and above the zoo and petitioners' property. A. 16a).

Perhaps in response to the groups' campaign, petitioners filed plat changes subdividing the property with the Office of the Surveyor in April 1988. Instead of the single lot that had been in existence since at least 1929, the subdivision created one lot for the apartment house and eight lots on the grounds facing Connecticut Avenue:[2]



In an affidavit, one of the petitioners acknowledged that Cathedral Mansions South "constituted one undivided parcel of property" before 1988. D.C. Cir. J.A. 53.

Under District law, land owners may make plat changes without notice to the public or permission from the Surveyor. D.C. Code § 1-920. So long as the size of the redrawn lots meets minima specified by the zoning regulations, the plat

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[2] *Source*: detail of attachment to Application for Historic Landmark, Mar. 1, 1989, reprinted in D.C. Cir. Br. for National Trust for Historic Preservation, *et al.*, as *amici curiae*. The existing building is on the left; the newly-created lots border directly on Connecticut Avenue.

changes will be recorded as a ministerial matter. D.C. Code § 1-921. Other than minimum lot size, there is no necessary correspondence between plat and zoning lots. 11 D.C.M.R. § 199.1 at 1-19 (zoning definition of "lot"). The only immediate consequence of subdivision is that reconfigured lots are taxed in accordance with their new configuration. D.C. Code § 47-802(1). The tax consequences of subdivision are within the property owners' control because lots may be as easily integrated as divided. A. 12a.

The record shows that petitioners spent $2,819 to survey and record the subdivision. Aside from that, the record contains no evidence of other spending, if any, on potential development of the property. The Surveyor recorded the subdivisions at the end of June 1988.

Six months after the subdivision, petitioners applied for building permits for three-story townhouses on each of the eight new lots. The townhouses would have occupied more than half of Cathedral Mansion South's remaining grounds. Building permits require approval of several government agencies. In February 1989, zoning officials approved petitioners' plans for filing, but no permits had been issued as of March.

In early March, neighbors filed their landmark-designation application. Under the Landmark Law, an application automatically confers temporary landmark status until Historic Preservation Review Board review is completed. D.C. Code § 5-1002(6)(B). The Review Board approved the landmark designation in May 1989. The landmark is the entire parcel. Petitioners did not ask for judicial review of the designation.

The applications to build the eight townhouses were submitted to the Board sometime in the spring of 1989. As part of the review process, the Commission of Fine Arts unanimously resolved in March that the townhouse project was "completely inappropriate" for the site. D.C. Cir. J.A. 317. In July, the Board recommended that the building permits be

denied on the basis of the Commission's written comments, expert and lay testimony, and a staff analysis showing that the grounds were integral to the landmark.

Petitioners appealed the Review Board's recommendation to deny the permits, but abandoned the appeal in December 1991.

A month after abandoning the 1988 applications, petitioners filed eight new applications identical to the ones they had abandoned. The record shows no additional investment by petitioners in the project. In March 1992, the Board voted to recommend denial of the new applications. Petitioners asked for further review.

An administrative law judge, acting by delegation from the Mayor, denied the second group of applications in 1993 because the proposed townhouses were incompatible with the character of the landmark. Although the ALJ thought that no construction would be compatible, his jurisdiction was limited to assessing the specific application before him. D.C. Code § 5-1007(a)("* * * the Mayor shall review the permit application in accordance with this section * * *). The ALJ also held that the petitioners had not demonstrated economic hardship.[3]

Petitioners appealed to the District of Columbia Court of Appeals, but because they had not challenged denial of the permits, the court dismissed the appeal as moot. *District Intown Properties L.P. v. Department of Consumer and Regulatory Affairs*, 680 A.2d 1373, 1379 (D.C. 1996). The court

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[3] The Cathedral Mansions South apartments are subject to rent control. Under the District of Columbia's rent-control law, rental property is entitled to a 12% rate of return, calculated by dividing net income by the owner's equity. D.C. Code § 45-2522. The rate of return is calculated by a formula in which petitioners' equity in Cathedral Mansions South as a whole constitutes the denominator and their property tax payments for the grounds would be included in deductions from gross income to derive net income (the numerator). *See* D.C. Code § 45-2522(b)(1)(C).

held, however, that the ALJ's statements concerning economic hardship could have no preclusive effect because the matter was outside his jurisdiction. *Id.* at 1378-1379.

2. Petitioners brought this action in 1996, demanding compensation for a regulatory "taking." On cross-motions for summary judgment, the district court held that petitioners had not been denied all economic use of their property, viewed as a whole. A. 29a-45a. The court concluded that petitioners' circumstances were therefore materially different from those in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). A. 36a-40a. The court also held that petitioners continued to obtain a reasonable economic return on their property, as in *Penn Central*, and that they had shown no reasonable investment-backed expectations that had been thwarted. A. 41a-45a.

The court of appeals affirmed. A. 1a-28a. The majority agreed that the property should be treated as a single parcel for takings analysis. A. 8a-9a. Not only was there common ownership, but all of the parcel was spatially and functionally contiguous and petitioners had treated the parcel as indivisible for over 25 years, even after subdivision. A. 9a. The court agreed with the trial court that petitioners had not established that they had been denied economic use of the parcel as a whole; they had not even presented evidence that the economic value of each of the new lots recorded in 1988 had been utterly destroyed. A. 13a. The court also held that denial of the applications defeated none of petitioners' reasonable investment-backed expectations. A. 15a. By the time of subdivision, the Landmark Act had been enacted and petitioners knew (or should have known) that their property would be subject to the new regulatory scheme. A. 16a.

The concurring judge agreed that the court's opinion generally followed this Court's precedent. A. 17a, 28a. The concurrence believed, however, that this Court's "prevailing analysis" was inconsistent with "economic reality" and pre-

vents full use of the Takings Clause in line with the "framers' likely purposes." A. 17a. The concurrence also rejected the court's "gratuitous[]" supplemental holding that petitioners had failed to provide sufficient evidence of a taking were the new lots to be analyzed independently. A. 27a-28a.[4]

REASONS FOR DENYING THE WRIT

Petitioners' use of their property, from which they undeniably profit, remains undisturbed by rejection of their plan to use the property more intensively. No taking occurs when owners have only "been denied the ability to exploit a property interest they heretofore had believed was available for development." *Penn Central*, 438 U.S. at 130. Not only do petitioners continue to receive a reasonable rate of return from their property, regulation has defeated no reasonable investment-backed expectations, and petitioners benefit from historic preservation designations of neighboring properties.

1. The decisions of the courts below are entirely consistent with this Court's precedent holding that the economic

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[4] Neither the court nor concurring opinions explicitly examined ripeness, an examination "compelled by the very nature of the inquiry." *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190 (1985); *see McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986)("[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes").

The District's brief in the court of appeals noted that petitioners had presented a single development scheme for the landmark. Denial of that one plan would ordinarily be insufficient to establish that the grounds lots, even if properly considered in isolation, had no economically viable use. *McDonald*, 477 U.S. at 353 n. 9; *Penn Central*, 438 U.S. at 136-137. Nevertheless, given the reviewing agencies' approaches, the District acknowledged that it seemed more likely than not that construction on at least one recorded lot would be deemed incompatible with the landmark, no matter what plan is proposed.

impact of regulation must be examined using the parcel as a whole.

In its most recent consideration of the question, the Court reaffirmed the parcel-as-a-whole standard. *Dolan v. Tigard*, 512 U.S. 374 (1994). The central issue in *Dolan* was whether a requirement that the property owner dedicate a portion of her property for use as a public greenway as a condition for receiving a building permit resulted in a taking. In its discussion, the Court observed that the permit conditions, viewed simply as a limitation on use of the property, would not rise to the level of regulatory taking: because a "land use regulation does not effect a taking if it * * * does not 'den[y] an owner economically viable use of his land,'" there could be "no argument that the permit conditions would deprive petitioner of 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot." *Id.*, at 385 & n. 6; brackets, the Court's. In short, the Court accepted the relevant parcel for analyzing a regulatory takings claim to include the entire property, not just the portion required for the greenway. Just as Dolan's ability to operate the store on the balance of her property precluded a finding of a regulatory taking, so could the lower courts here reasonably conclude that petitioners' continued profitable operation of the apartment house was not a taking despite restrictions on development of the grounds, considering the parcel as a whole.

Previously, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court rejected an argument that a statute preventing coal companies from mining 27 million tons of coal to avert subsidence of the ground surface was a taking. The 27 million tons could no more be treated as a separate segment of property than the grounds of a structure on which a zoning law prohibits construction. *Id.* at 498, citing *Gorieb v. Fox*, 274 U.S. 603, 608 (1927). The Court also rejected the claim that, because Pennsylvania recognizes a support estate as a separate interest in land, the requirement

that supports be retained entirely destroyed their "support estate." Takings analysis, the Court held, forecloses reliance on such "legalistic distinctions within a bundle of property rights." *Id.* at 500.

In *Penn Central* the Court used the parcel-as-a-whole analysis to reject the owners' contention that a historic preservation statute, preventing the erection of a more than fifty-story office tower over Grand Central Station, had taken all of their airspace. The Court wrote that the focus should be "on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'" 438 U.S. at 130-131. If a taking could be established by showing that property could no longer be exploited to its fullest,

> this court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey* [214 U.S. 91 (1909)], but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and the lateral, see *Gorieb v. Fox*, 274 U.S. 603 (1927), development of particular parcels. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.

Id. at 130; footnote omitted.

The Court has extended the "parcel-as-a-whole" doctrine to government regulations preventing full economic exploitation of personal property. In *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-644 (1993), the Court unanimously rejected a claim that a federal law imposing a liability on employers withdrawing from a pension system (which had the effect of eliminating 46% of Concrete Pipe's shareholder equity) took the employer's property in its entirety. A parcel of property

"could not first be divided into what was taken and what was left"; "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Id.* at 644. In *Andrus v. Allard*, 444 U.S. 51, 64-68 (1979), the Court rejected the argument that a ban on the sale of all bird-feather artifacts, including objects acquired before the ban, qualified as a compensable taking. Although the prohibition extinguished the opportunity to sell the feathered objects, owners retained rights to possess, transport, donate, exhibit, or devise them: when "an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 66.

The decisions below are entirely consistent with the Court's precedent and modes of analysis. The concurring opinion arrived at the same conclusion, if grudgingly. *See* A. 28a ("* * * the Supreme Court's general approach seems to militate in favor of looking to the parcel as a whole"; the Court's precedent gives counter arguments "little purchase").

2. There is no pressing need to revisit the parcel-as-a-whole doctrine at this time (or in this case).

As a preliminary matter, this Court has been understandably wary about creating bright-line tests for the Takings Clause. Takings jurisprudence, the Court has long held, involves "question[s] of degree—and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Compensability "depends upon the particular facts" of the case. *Id.* at 413, quoted with approval in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999). Inquiries therefore have often been described as "essentially ad hoc [and] factual." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *see Lucas*, 505 U.S. at 1015; *McDonald, Sommer & Frates v. Yolo*

County, 477 U.S. 340, 348-349 (1986); *Keystone*, 480 U.S. at 508; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981); *Penn Central*, 438 U.S. at 124; *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *see also Goldblatt*, 369 U.S. at 594 (takings analysis does not lend itself to a "set formula to determine where regulation ends and taking begins"); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998)("Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law")(Kennedy, J., concurring in judgment, dissenting in part).[5]

In any event, courts have had no significant disagreements about the meaning of the Court's existing case-law (notwithstanding the overwrought rhetoric of commentators cited in the petition). There are no major disagreements among either the federal courts of appeals or the highest courts of the states. Using multi-factored analyses to account for factual differences, they have refused to give substance to owners' purely formal organization of property when applying the parcel-as-a-whole standard. *See, e.g.*, *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365-1367 (Fed. Cir. 1999), *cert. denied sub nom. RCK Properties, Inc. v. United States*, 68 U.S.L.W. 3262 (1999); *Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 239-240 (1996), *aff'd in relevant part*, 121 F.3d 727 (table), 1997 U.S. App. LEXIS 19859 (text) at *3-*6 (Fed. Cir. 1997); *Deltona Corp. v.*

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[5] One commentator has noted:

> Although one could conceivably propose such a [bright-line] standard, it is unlikely that it would prove to be satisfactory in the vast majority of cases. Rather, it would end up being regarded as a Procrustean bed, with courts hopelessly trying to fit their factually unusual cases within the rule's narrow formulation.

M.C. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 719 (1996).

United States, 228 Ct. Cl. 476, 657 F.2d 1184, 1192 (1981), *cert. denied*, 455 U.S. 1017 (1982); *Jentgen v. United States*, 228 Ct. Cl. 527, 657 F.2d 1210, 1213 (1981), *cert. denied*, 455 U.S. 1017 (1982); *Annapolis v. Waterman*, 357 Md. 484, 745 A.2d 1000, 1022 (2000); *K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d 531, 535-538 (Mich. 1998), *cert. denied*, 525 U.S. 819 (1998); *Zealy v. Waukesha*, 201 Wisc.2d 365, 548 N.W.2d 528, 532-34 (1996); *Bevan v. Brandon Township*, 438 Mich. 385, 475 N.W.2d 37, 43 (Mich. 1991), *cert. denied*, 502 U.S. 1060 (1992).

The only clear exceptions to this uniformity are isolated state intermediate appellate court decisions (the most recent of which arose in litigation that remains active and is therefore subject to further state appellate review). Pet. at 15-17, citing *Machipongo Land & Coal Co. v. Pennsylvania*, 719 A.2d 19 (Pa. Commw. Ct. 1998); *Twain Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71, 265 Cal. Rptr. 737 (1990), *review denied* (Cal. Apr. 4, 1990). The petition also cites *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411, 419-420 (Or. 1997). There, the court held that a complaint alleging deprivation of "the only economically viable use" of a logging company's timber because of logging restrictions on 56 of 64 acres, stated a cause of action under the *state* constitution. *Id.* at 419 n. 13 ("This court considers state constitutional claims before considering federal constitutional claims"). The court cited none of this Court's decisions and based its analysis entirely on state precedent. Neither the intermediate appellate court decisions nor the Oregon court's interpretation of its state constitution create a need for augmenting this Court's existing precedent.[6]

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[6] The petition also cites *Corrigan v. Scottsdale*, 149 Ariz. 553, 720 P.2d 528 (Ariz. App. 1985), *aff'd in part, vacated in part*, 149

(continued...)

Finally, although the merits of the Court's precedents are not at issue at this stage, it deserves noting that petitioners' proposed rejection of the parcel-as-a-whole standard endangers a broad variety of traditional urban land planning regulations limiting intensity of use, such as minimum lot sizes, limitations on lot occupancy, side- and rear-yard open space requirements, and historic preservation. *See Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980)(recognizing open space requirements as legitimate government regulation); *Penn Central*, 438 U.S. at 107 (noting that all fifty states and over 500 municipalities had enacted historic preservation laws as of 1978). As one leading authority testified a few years ago, such regulation is

> almost universally accepted as fair to both the public and to property owners * * * Indeed, with adaptive and innovative modern techniques stimulated by local land use regulation * * * owners often end up with developments that are highly profitable and attractive to buyers, even though not every acre can be developed.
>
> The risk here is owners "gaming the system" by rearranging ownership patterns to maximize compensability * * *.

Statement by J. L. Sax, Hearings on Private Property Rights and Environmental Laws, Sen. Comm. on Environment and Public Works, 104th Cong., 1st sess., Jun. 27, 1995, at 78.

In addition, there is little support for the concurring opinion's statement (A. 17a), that this Court's precedent defeats the founders' "likely purposes." *See Lucas*, 505 U.S. at 1014

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[6] (...continued)
Ariz. 538, 720 P.2d 513 (1986), *cert. denied*, 479 U.S. 986 (1986). Although the landowner there owned three parcels, the city apparently never argued that they should all be considered as one. Neither court directly addressed the first question raised by the petition.

(prior to *Pennsylvania Coal Co.* in 1922, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession"; citations omitted; brackets, the *Lucas* Court's). *See also*, J.F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARVARD L. REV. 1252 (1996).[7]

3. There is no pressing reason for reviewing the application of this Court's precedent to the facts of this case.

Unlike *Lucas*, this is plainly not an case in which petitioners have been denied economically viable use of their property. Inability to implement petitioners' single plan for the landmark left them with property generating a reasonable return on their current equity. Petitioners presented no evidence to the contrary. Absent such evidence, it is fair to assume that the rate of return on equity is at least 12%. *See* above at 6, n. 3.

The property is being used as it was deliberately designed, as an apartment building in a "resort-like" setting, a use to

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[7] Hart writes:

> Application of the Takings Clause to regulations of land use must confront and explain the silence in the constitutional text. The Takings Clause refers only to *taking* property; as to regulating property, it is silent. [At 1290; italics in original, footnote omitted].
>
> * * *
>
> The evidence concerning the Framers' experience with land use regulation suggests that the Takings Clause means what it says about land use regulation: nothing. The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking. [At 1292].
>
> * * *
>
> The tradition that courts have relied on for over a century—the view that American governments traditionally regulated land use minimally, and that regulation ventured little beyond nuisance law in scope—is false. [At 1299].

which petitioners themselves put the property for 27 years. There is unity of ownership and physical contiguity. As one of the petitioners acknowledged, for at least sixty years, Cathedral Mansions South "constituted one undivided parcel." *See* above, at 4. Except for formal plat changes in 1988 (themselves easily reversible), that is still the case.

As a unit, the property enjoys the average reciprocity of advantage common to all similarly regulated properties in the community. *See Pennsylvania Coal*, 260 U.S. at 422. Unlike the isolated landmark at stake in *Penn Central*, Cathedral Mansions is situated amid a broad swath of historic districts and historic landmarks. *See* District of Columbia Inventory of Historic Sites (map, 1998), appended to D.C. Cir. br. for National Trust for Historic Preservation. Undesignated areas in the vicinity are the rare exception. Petitioners "therefore will share with other owners the benefits and burdens of the city's exercise of its police power." *Agins*, 447 U.S. at 262.

Treating the property as a single parcel defeats no reasonable investment-backed expectations. The Court considers only owners' "primary expectations." *Penn Central*, 438 U.S. at 136. Those expectations normally arise at the time of acquisition. *See Lucas*, 505 U.S. at 1008; *Penn Central*, 438 U.S. at 127. Petitioners presented no evidence that they expected to alter the property's traditional use when they purchased it in 1961 (or in the 27 years after purchase). Moreover, their development choices were circumscribed at the outset by the Shipstead-Luce Act which governed building near the zoo. *See Stanley Co. v. Tobriner*, 111 U.S. App. D.C. 404, 298 F.2d 318, 319 (1961)(affirming refusal to issue permit to alter building visible from Pennsylvania Avenue). That law formed a "background principle[]" of District of Columbia property law at the time petitioners purchased Cathedral Mansions South. *See Lucas*, 505 U.S. at 1031.

To the extent that petitioners subsequently decided to carve up their property in 1988, their new expectations, if

relevant, were not investment-backed. There is no record evidence of any expenditures associated with the 1991 applications. (As for the voluntarily abandoned 1988 applications, petitioners' $2819 expenditure is a *de minimis* investment in light of the property's assessed value of $2.3 million at the time). Besides, by 1991, petitioners expectations of substantial changes in intensity of use were no longer reasonable in view of enactment of the Landmark Law *before* the subdivision and the landmark designation *before* the 1991 applications. The function of the reasonable investment-backed expectations element of Takings Clause jurisprudence is to protect landowners from the risks of unforeseen changes in applicable law. It follows that owners should bear risks that *are* foreseeable. *See id.* at 1035 ("The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment")(Kennedy, J., concurring).

4. There is no need to review the court of appeals secondary holding, that petitioners had not presented competent evidence that the new lots—even if considered in isolation—had lost all economic value as a result of denial of their only development plan. A. 13a.

The evidentiary issue, raised by the petition's second question, was not essential to the court's judgment in view of the holding that the new lots could *not* be considered in isolation. A. 12a (under this Court's precedent, "we must analyze District Intown's property not as separate, potentially divisible and transferable parcels, but as one contiguous parcel").

The court of appeals is correct, however, that there was a failure of proof. Rejection of one "grandiose development plan does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *McDonald, Sommer & Frates*, 477 U.S. at 353 n. 9. A less massive plan, one which does not altogether obliterate views of (and from) the apartment house, might be found compatible with the land-

mark by the Commission on Fine Arts, the Historic Preservation Review Board, or (most importantly) an administrative law judge. Tennis courts, a swimming pool, an ice skating rink, for example, might be considered compatible with a "resort-like" setting. An underground parking lot might be feasible and unobtrusive. Even some above-ground construction might be approved. Absent petitioners' exploration of a single option other than their original proposal, the court of appeals could reasonably conclude that petitioners had not established that the new lots were entirely valueless by themselves.[8]

Not only is the adequacy of evidence not deserving of this Court's consideration, it is irrelevant; under the Court's precedent, the lots have no significance independent of the parcel as a whole.

Neither question presented by the petition is worthy of further review.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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[8] The petition's reference (at 25) to petitioners' appraiser's deposition is misleading. His testimony, that the new lots would have no value when separated from the rest of the property, was predicated on an unsupported assumption: "*if* you have to maintain it as a lawn." D.C. Cir. J.A. 447; italics added. The appraiser also misunderstood local law when he claimed that the parcel, as a whole, derived no economic benefit from its grounds because of rent control. *Id.* at 452. In fact, petitioners' equity and property tax payments determine whether the property is yielding at least a 12% rate of return. *See* above, at 6, n. 3. Moreover, his conclusion was contradicted by another appraiser who stated that the highest and best use of the grounds was their existing use as integral parts of the apartment complex. *Id.* at 451.

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